FILED
NOV 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No 89-684

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

THE SAMPLE, INC.

Petitioner,

v.

PENDLETON WOOLEN MILLS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT PENDLETON WOOLEN MILLS, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Nicholas N. Price*
Barry Simon
Suite 3600, 1600 Market Street
Philadelphia, PA 19103
(215) 751-2196
Attorneys for Respondent

Wayne Hilliard
SPEARS, LUBERSKY, CAMPBELL, BLEDSOE, ANDERSON & YOUNG
520 S.W. Yamhill Street
Portland, Oregon 97204-0388
(503) 226-6151

SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600, 1600 Market Street
Philadelphia, PA 19103
(215) 751-2000
Of Counsel.

**Counsel of record for respondent*

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA 19103 (215) 563-9000

PARTY LIST AND CORPORATE PARENTS

Pursuant to U.S. Sup. Ct. R. 21.1(b), 28.1 and 34.1(b), Respondent, Pendleton Woolen Mills, Inc., states that it has no corporate parents or affiliates, and that the only subsidiary not wholly-owned is Jacques deLoux, Inc. Respondent also states that the only parties to this proceeding are those listed in the caption of the case.

TABLE OF CONTENTS

	Page
PARTY LIST AND CORPORATE PARENTS	i
TABLE OF AUTHORITIES	iii
COUNTER-STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	4
I. Petitioner Has Identified Neither Any Issue of Far-reaching Significance Nor Any Conflict Among the Circuits That Might Justify a Writ of Certiorari	4
II. The Decisions by the Courts Below Were Clearly Correct	9
III. This Court Should Not Certify State Antitrust Issues to the Highest New York State Court	14
CONCLUSION	17

TABLE OF AUTHORITIES

Cases: Page

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 7

Arnold Pontiac-GM, Inc. v. Budd Baer, Inc., 826 F.2d 1335 (3d Cir. 1987)..... 8

Creative Trading Company, Inc. v. Larkin-Pluznick-Larkin, Inc., 148 A.D.2d 352, 539 N.Y.S.2d 1 (1st Dept 1989) 15

Fallis v. Pendleton Woolen Mills, Inc., 866 F.2d 209 (6th Cir. 1989)..... 10

H.L. Hayden Co., v. Siemens Medical Systems, 672 F. Supp. 724 (S.D.N.Y. 1987) 10

H.L. Moore Drug Exchange v. Eli Lilleys Co., 662 F.2d 935 (2d Cir. 1981)..... 12

Lehman Brothers v. Schein, 416 U.S. 386 (1974)..... 14, 16

Leonard v. Dixie Well Service & Supply, Inc., 828 F.2d 291 (5th Cir. 1987)..... 8

Magnum Import Company, Inc. v. Coty, 262 U.S. 159 (1922) 6

Matsushita Electric Industrial Co. v. Zenith Radio Company, 475 U.S. 574 (1986)..... 7

McLaughlin v. Liu, 849 F.2d 1205 (9th Cir. 1988) 8

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) 2, 3, 5, 8, 12, 13

Retail Software Services, Inc. v. Lashlee, 71 N.Y. 2d 91, 525 N.Y.S.2d 91, 525 N.E.2d 737 (1988) (per curium)..... 15

State v. Mobil Oil Corp., 38 N.Y.2d 460, 381 N.Y.S.2d 426, 344 N.E.2d 357 (1976)..... 15

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

United States v. Colgate & Co., 250 U.S. 300 (1919) 12

United States v. Johnston, 268 U.S. 220 (1925)... 6

STATUTES & RULES

Conn. Public Act No. 85-111..... 14

Donnelly Act, N.Y. Gen. Bus. Law § 340..... 2, 4, 14, 15, 16

N.Y. Court of Appeals Rule 500.7..... 14

Rules of the United States Court of Appeals for the Second Circuit § 0.27..... 14

Sherman Act, 15 U.S.C. § 1..... 2, 3, 4

Sherman Act, 15 U.S.C. § 2..... 2, 4

U.S. Supreme Court Rule 21.1(a) 12

OTHER AUTHORITIES

69 S. Ct. v, vi (Sept. 7, 1949) 6

No 89-684

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

THE SAMPLE, INC.

Petitioner,

v.

PENDLETON WOOLEN MILLS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT PENDLETON WOOLEN MILLS, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

Petitioner, The Sample, Inc. ("Petitioner" or "The Sample"), is a retailer of men's and women's apparel, and owns several stores in the Buffalo, New York area. Respondent, Pendleton Woolen Mills, Inc. ("Respondent" or "Pendleton"), is a manufacturer of woolen clothing, blankets and piece goods, which it sells to retailers throughout the country.

On January 3, 1985, Pendleton notified The Sample that it had decided to cease soliciting The Sample's

business. Thereafter, The Sample commenced this action, alleging that Pendleton's decision to discontinue doing business with it was unlawful under sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2), under New York's Donnelly Act (N.Y. Gen. Bus. Law 340), and under principles of common law fraud.

On January 23, 1989, the Honorable Leonard B. Sand of the United States District Court for the Southern District of New York granted summary judgment in Pendleton's favor on all of The Sample's claims.[1] In so ruling, Judge Sand carefully analyzed the controlling precedents which distinguish between lawful unilateral action and unlawful concerted action. Thus, relying heavily on this Court's decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), Judge Sand noted that "a manufacturer has the right to deal, or refuse to deal, with a distributor, as long as it does so independently" and that "a distributor can decide to conform to a manufacturer's suggested retail price to avoid termination" without such conduct being held a conspiracy. (Appendix to Petition, at D-4). He further stated that, "to avoid summary judgment on its price-fixing claim, [The Sample] must advance sufficient evidence to raise a genuine dispute as to whether Pendleton was involved in a vertical, price-fixing scheme." (*Id.*, at D-6). He also observed that "The Sample must show not merely that retailers conformed to Pendleton's suggested prices, but rather that the retailer 'communicated its acquiescence or agreement, and that this was sought by the manufacturer.' " (*Id.*, quoting *Monsanto, supra*, 465 U.S. at 764 n.9).

Judge Sand then carefully analyzed the evidence in light of the foregoing legal principles and concluded that The Sample had failed to raise a genuine issue of fact as

---

1. Judge Sand's opinion is reported at 704 F. Supp. 498 (S.D.N.Y. 1989), and a copy is included in the Appendix to The Sample's Petition at D-1 through D-15.

to whether Pendleton had engaged in an unlawful conspiracy. He first determined that allegations that Pendleton conspired with its own sales representatives were deficient as a matter of law, since the sales representatives were agents of Pendleton and did not constitute separate entities within the meaning of the Sherman Act. (Appendix to Petition, at D-6 to D-7).[2] Judge Sand then addressed the evidence allegedly showing the existence of a conspiracy between Pendleton and The Sample's competitors in the Buffalo area, but concluded that this evidence was insufficient "to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." (Appendix to Petition, at D-8, quoting *Monsanto, supra,* 465 U.S. at 768). Among other things, Judge Sand noted that "The Sample has . . . failed to show any agreement by retailers to abide by keystone prices." (Appendix to Petition, at D-9).[3]

On June 22, 1989, the United States Court of Appeals for the Second Circuit unanimously, and by summary order, affirmed the judgment of the District Court "substantially for the reasons set forth in Judge Sand's opinion . . ." (Appendix to the Petition, at B-2). Later, on July 28, 1989, the Court of Appeals denied The Sample's petition for rehearing. (Appendix to Petition, at A-1).

In its Petition for a Writ of Certiorari, The Sample asks this Court to review the lower courts' dismissal of its claim under section 1 of the Sherman Act, and to order the Court of Appeals for the Second Circuit to certify "state antitrust law issues" under New York's Donnelly Act to the highest court of the State of New York, the New York Court of Appeals. The Sample has

---

2. The Questions Presented at the beginning of the Petition do not identify the issue of whether Pendleton could conspire with its sales representatives as an issue on which certiorari is sought.

3. "Keystone prices" are retail prices equal to twice the wholesale cost. *See* Appendix to Petition, at D-3, n.1.

apparently abandoned its claims under section 2 of the Sherman Act and for common law fraud.

SUMMARY OF ARGUMENT

Petitioner has not raised any issues of sufficient importance to justify certiorari. The Court of Appeals did not write an opinion, and it expressly stated that its summary affirmance of the District Court's opinion had no precedential value to unrelated cases. Also, Petitioner's challenge to the District Court's opinion is directed to the District Court's application of well-established legal principles to the particular facts of the case, and the District Court in fact did not adopt any novel or unprecedented principle of law. In addition, the District Court's decision was clearly correct. These facts all make the lower courts' dismissal of Petitioner's claim under Section 1 of the Sherman Act an inappropriate subject for review by this Court. Finally, this Court should not certify Petitioner's state antitrust law claims to the New York Court of Appeals, because Petitioner did not properly seek certification below, because Petitioner has not properly identified what issues it wants certified, and because New York state antitrust law is clear and was properly construed by the District Court.

ARGUMENT

I. Petitioner Has Identified Neither Any Issue of Far-reaching Significance Nor Any Conflict Among the Circuits That Might Justify a Writ of Certiorari.

Petitioner has not advanced any sound basis for this Court to grant certiorari. Petitioner's attempt to argue that this case presents important legal issues justifying certiorari is clearly belied by, among other things, the fact that the Court of Appeals for the Second Circuit concluded that the case did not even warrant a written opinion. Indeed, in summarily affirming the District

Court's grant of summary judgment, the Court of Appeals expressly stated that its affirmance "should not be cited or otherwise relied upon in unrelated cases before this or any other court." (Appendix to Petition, at B-2). There is no reason why this Court should grant certiorari to review a decision which, by its own terms, has absolutely no precedential value to unrelated cases.

Furthermore, nothing in the District Court's opinion provides any justification for granting certiorari. Nowhere in the District Court's opinion is there any hint of a discussion of any novel or controversial legal issues. Nowhere does the District Court purport to adopt a rule of law that is contrary to, or unsupported by, judicial precedent. Rather, a review of the District Court's opinion makes clear that that Court carefully and correctly analyzed the very precedent on which Petitioner principally relies – *Monsanto, supra* – and applied that precedent to the particular facts of this case.

The Petition itself likewise fails to identify any disputed legal issue justifying review by this Court. Thus, nowhere in its Petition does The Sample take issue with the District Court's statement of the law (as set forth at pages D-4 through D-6 of the Appendix to the Petition) regarding the elements of a claim under section 1 of the Sherman Act or the standards for summary judgment. Indeed, the Petition could not challenge the District Court's articulation of the applicable legal principles, since its opinion accurately stated the law in all respects.

Since The Sample does not – and cannot – challenge the District Court's statement of the law, the Petition consists of nothing more than a challenge to the District Court's application of well-established legal principles to the particular facts of this case. Thus, the Petition argues that the District Court erred in failing to give sufficient weight to allegedly "direct evidence" of unlawful agreements, as expressed in (1) affidavits and

deposition testimony of former Pendleton sales representatives, (2) a document entitled the "Profitability Plan," (3) letters from Pendleton's National Sales Manager to various retailers, (4) information Pendleton obtained about retailers' gross margins, (5) speeches by Pendleton's National Sales Manager, etc. *See* Petition for Certiorari, at 5-14, 23-28, and 34-41. However, the District Court *did* consider this evidence carefully, and it expressly addressed this evidence in its opinion, concluding that it was insufficient to create a genuine issue of material fact as to whether Pendleton engaged in an unlawful conspiracy. *See* Appendix to Petition at D-6 through D-10.

Thus, it is clear that Petitioner's complaint is not with the legal principles adopted by the courts below; rather, it is with the courts' application of those legal principles to the particular fact of this case. Although (as stated in part II of this brief, *infra*) the lower courts' rulings were clearly correct, it is not the function of certiorari to give a disappointed litigant another chance at appellate review. *Magnum Import Company, Inc. v. Coty,* 262 U.S. 159, 163 (1923). Likewise, it is this Court's practice not to grant certiorari to review evidence and discuss specific facts. *United States v. Johnston,* 268 U.S. 220, 227 (1925). As Chief Justice Vinson stated in an address to the American Bar Association in 1949: "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court opinions," because in most cases brought to the Supreme Court (like this one) "the petitioner has already received one appellate review of his case." 69 S. Ct. v, vi (Sept. 7, 1949).

That Petitioner merely seeks another chance at appellate review is clear from the questions presented at the beginning of the Petition. Those questions do not state any novel or unsettled questions of law warranting resolution by this Court. Rather, they merely challenge the application of the law to the facts of this case.

For example, the first question presented is "[w]hether the Second Circuit's affirmance of a summary judgement decision in an antitrust case based on inferences favoring the moving party, ignoring direct evidence produced by the non-moving party, . . . violates standards previously established by this Court." This "question" assumes that summary judgment was "based on inferences favoring the moving party" and that the District Court "ignor[ed] direct evidence produced by the non-moving party." In fact, those assumptions are palpably incorrect. The District Court did not ignore Petitioner's evidence, but expressly considered it, finding it insufficient to raise a genuine issue of material fact. Furthermore, Judge Sand expressly acknowledged that "inferences must be drawn in favor of the non-moving party," but also noted that, under this Court's precedents, " 'antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case.' " (Appendix to Petition, at D-5, quoting *Matsushita Electric Industrial Co. v. Zenith Radio Company,* 475 U.S. 574, 588 (1986)). In any event, Petitioner's first "question" is not a question of law, but a question of whether the law was correctly applied to a particular set of facts. This type of question is routinely answered by our district courts and courts of appeals, but not by this Court.

The second "question" presented is "[w]hether the credibility issues raised by direct evidence controverting defendant's claim of unilateral action require denial of defendant's summary judgment motion under *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986)". This "question" likewise fails to present anything more than an attempt at yet another chance at appellate review. Nowhere in its opinion did the District Court purport to resolve any "credibility issues." Rather, it is clear from the District Court's opinion that that Court expressly considered the evidence offered by Petitioner but found

that it was insufficient to withstand a motion for summary judgment.

The arguments advanced in the body of the Petition likewise provide no justification for granting certiorari. The Petition's contention that "the decision below should be reviewed for conflicts with the evidentiary rule of *Monsanto*" (Petition, at 31) is nothing more than an argument that the District Court erred in applying the law as articulated in *Monsanto* to the facts of this case. The Court of Appeals considered the same evidence and contentions, and affirmed the District Court. There is no need for further review by this Court.

Petitioner's argument that a conflict exists among the circuits (Petition, at 44-56) is similarly without merit. No conflict among the circuits exists because the Second Circuit did not even write an opinion in this case and, indeed, stated that its summary affirmance "should not be cited or otherwise relied upon in unrelated cases before this or any other court."

Furthermore, no conflict exists between the District Court's opinion and the Circuit Court decisions on which Petitioner relies. Those Circuit Court decisions arose in entirely different factual contexts than the case at bar. Indeed, not one of them involved claims of vertical price-fixing.[4] Petitioner's contention that the "Third, Fifth and Ninth Circuits have held that motions for summary judgment should be denied when non-moving party has produced direct evidence under Rule 56" (Petition, at 45) hardly establishes a conflict with

---

4. *McLaughlin v. Liu,* 849 F.2d 1205 (9th Cir. 1988), involved a claim for unpaid overtime pay under the Fair Labor Standards Act. *Leonard v. Dixie Well Service & Supply, Inc.,* 828 F.2d 291 (5th Cir. 1987), was a suit for personal injuries under the Jones Act. Of the three circuit court decisions allegedly in "conflict" with the Second Circuit's decision here, only *Arnold Pontiac-GM, Inc. v. Budd Baer, Inc.,* 826 F.2d 1335 (3d Cir. 1987), was an antitrust case. However, that case involved claims of "horizontal market allocation" and "group boycott," not vertical price-fixing.

Judge Sand's opinion. Nothing in Judge Sand's opinion purports to take issue with Petitioner's above-quoted statement of the law. Rather, Judge Sand considered the evidence on which Petitioner relies but concluded that it in fact constituted neither direct nor circumstantial evidence of price-fixing. (Appendix to Petition, at D-8). He therefore concluded that it was insufficient to defeat summary judgment. The Petition has failed to present any valid reason why this Court should grant certiorari.

II. The Decisions by the Courts Below Were Clearly Correct.

The bulk of the Petition is devoted to attacking the correctness of Judge Sand's decision and the Court of Appeals' affirmance. The writ of certiorari does not exist to grant a disappointed litigant another chance at appellate review, and thus Petitioner's challenges to the correctness of the lower courts' decisions are simply misplaced. In any event, and contrary to Petitioner's contentions, the lower court decisions were clearly correct, further justifying denial of certiorari.

One of the more notable aspects of the Petition is what it omits. Among other things, it omits any reference to any evidence that Pendleton sought and obtained any agreements with any of The Sample's competitors to maintain any level of retail price. It omits any reference to such evidence because no such evidence exists. Petitioner relies heavily on affidavits and deposition testimony of a number of terminated Pendleton sales representatives, but ignores the fact that each of those sales representatives describe events occurring outside the Buffalo area market. Thus, that evidence does not involve any of The Sample's competitors.[5] In

---

5. For example, the Petition relies heavily on affidavits by Lee and Priscilla Loveridge, James P. Donahue, David Fallis and Harry Thornton (Petition at 23-28), all of whom were terminated Pendleton sales representatives. None of those sales representatives had

any event, Judge Sand correctly characterized this affidavit and deposition evidence (which was rife with hearsay, speculation, and lay opinions on the legality of Pendleton's conduct) as nothing more than " 'a quilt of speculation.' " Appendix to Petition at D-10, quoting *H.L. Hayden Co. v. Siemens Medical Systems,* 672 F. Supp. 724, 740 (S.D.N.Y. 1987).

Petitioner also relies heavily on a document entitled the "Profitability Plan," upon which Petitioner claims "[t]he price-fixing conspiracy centers . . . " (Petition, at 5). Judge Sand carefully analyzed the Profitability Plan, and correctly concluded that it did not constitute any evidence of a price-fixing conspiracy. Rather, Judge

---

NOTES *(Continued)*

had any responsibility for The Sample or the Buffalo area prior to their terminations, and Messrs. Donahue and Thornton were terminated even before Pendleton discontinued sales to The Sample. Mr. Fallis worked in Ohio. In ruling against him after a full trial, the jury specifically found that Pendleton had not violated the FTC Consent Order in his territory. All of the trial court's rulings in that case were affirmed on appeal. *Fallis v. Pendleton Woolen Mills, Inc.,* 866 F.2d 209 (6th Cir. 1989).

The Petition's reliance on a transcript (included in the Court of Appeals Appendix at A. 438-46) of a recorded conversation between Mr. Loveridge and Mr. O.L. Brown (see Petition at 24-27) is likewise unavailing. This taped conversation was between two sales representatives (not a member of Pendleton's management) and is thus inadmissible hearsay. It also is rife with inadmissible lay opinion as to the legality of certain acts. Moreover, the events referred to therein pertain to Mr. Brown's territory in Ohio, outside the Buffalo area market. Finally, all the accusations of illegal conduct recorded in that conversation were made by Mr. Loveridge, a witness hostile to Pendleton who surreptitiously recorded the conversation without Mr. Brown's knowledge and who later filed his own lawsuit against Pendleton.

Finally, Petitioner's argument that the lower courts erred in disregarding evidence that two Pendleton sales representatives also had interests in retail stores is meritless. None of those sales representatives or stores did any business in the Buffalo market area, and no evidence was adduced that any of those sales representatives or retailers played any role in Petitioner's termination.

Sand observed that the Plan merely offers advice to the retailer, and stated:

> "For example, it suggests trying to sell ensembles, ordering a full collection of Pendleton lines, presenting Pendleton separately from other lines, and devoting resources to the training of salespeople. The Plan includes samples of the kind of advertisements that Pendleton provides, as well as an array of aids available to the retail store from Pendleton (display posters, counter cards, and training film). Although The Sample seizes upon this Plan as evidence of a conspiracy, we find such a conclusion to be unsupported."

(Appendix to Petition, at D-8 through D-9). Judge Sand then proceeded to discuss the specific portions of the Profitability Plan on which Petitioner relies and found them insufficient to support a finding of a price-fixing conspiracy. (*Id.* at D-9). A review of the Profitability Plan (reprinted in full in the Appendix to the Petition at G-7 through G-11) will confirm the correctness of Judge Sand's reading of it.

Petitioner's reliance on the Profitability Plan is also fatally undermined by Petitioner's own admission that the Profitability Plan was never even offered to The Sample. (Petition, at 14). Thus, even if the Profitability Plan somehow constituted evidence of a price-fixing conspiracy (which it did not), Petitioner cannot even make the showing that Pendleton tried to coerce it into adhering to that Plan. The Profitability Plan is simply irrelevant to Petitioner's case.

Petitioner's reliance on excerpts from a speech of Pendleton's National Womenswear Sales Manager (Petition, at 8) is not only irrelevant (in that it asks this Court to engage in a review of the details of the evidence), but is also misplaced and misleading. For example, Petitioner presumably underscored the phrase "and are in agreement" on page 8 of the Petition in order

to suggest the existence of an unlawful conspiracy. However, any "agreement" referred to in that speech was only between Pendleton's sales management and its sales representatives. As noted previously, Judge Sand expressly (and correctly) found that no unlawful conspiracy within the meaning of the antitrust laws could be proven by reference to agreements between Pendleton and its own sales representatives (Appendix to Petition, at D-6 through D-7), and Petitioner has not sought certiorari on this issue. *See* U.S. Sup. Ct. R. 21.1(a). Petitioner's reliance on the portion of the Sales Manager's speech that is indented on page 8 of the Petition is similarly misplaced. Nothing in that excerpt, or in the remainder of the speech (which Petitioner overlooks), suggests that Pendleton was acting in concert with any retailers in deciding to whom it would sell. Petitioner's reliance on the speech thus ignores the fact that, under *Monsanto* and other precedents of this Court,[6] Pendleton had the absolute right not to do business with any particular retailers, so long as it acted unilaterally in doing so. *Monsanto, supra,* 465 U.S. at 761.

Petitioner also argues that the reasons given by Pendleton for ceasing to solicit The Sample's business (*i.e.,* that it was "overdistributed in the Buffalo market area") were pretextual. (Petition, at 9-14). These contentions are wrong and, in any event, miss the point. It was Petitioner's burden below to produce evidence that Pendleton's cessation of business with The Sample was the product of an unlawful conspiracy; it was not enough merely to adduce evidence purportedly showing that Respondent's justifications given were not factually supported. *See, e.g., H.L. Moore Drug Exchange v. Eli Lilley & Co.,* 662 F.2d 935, 941 (2d Cir. 1981).

---

6. *See, e.g., United States v. Colgate & Co.,* 250 U.S. 300, 307 (1919).

Petitioner's reliance on evidence that Pendleton collected information on retailers' gross margins with Pendleton merchandise and that such gross margins were close to 50% (Petition, at 12-14) is likewise without merit. This Court has previously ruled that a manufacturer has legitimate reasons to share price information with its distributors, and that it can do so without creating an inference of a price-fixing conspiracy. *See Monsanto, supra,* 465 U.S. at 762. Furthermore, even if gross margin figures established that retailers generally adhered to Pendleton's suggested retail prices, that would be insufficient to establish a price-fixing conspiracy. Indeed the fact that a manufacturer announces its suggested resale prices in advance, and that a distributor acquiesces in the suggested price in order to avoid termination, does not establish an unlawful conspiracy. *Monsanto, supra,* 465 U.S. at 761. Rather, a plaintiff must introduce "evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently," which means that there must be evidence "that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " *Id.* at 764. In other words, "evidence must be presented both that the distributor *communicated* its acquiescence or agreement, and that this was sought by the manufacturer." *Id.* at 764 n.9 (emphasis added).

Both in its Petition to this Court, and in its papers below, The Sample failed to introduce any evidence that tends to exclude the possibility that Pendleton and The Sample's competitors were acting independently, that Pendleton and The Sample's competitors "had a conscious commitment to a common scheme designed to achieve an unlawful objective," or that any of The Sample's competitors "communicated its acquiescence or agreement" regarding resale prices to Pendleton. Thus, the lower court decisions were clearly correct.

III. This Court Should Not Certify State Antitrust Issues to the Highest New York State Court.

The third issue presented for review is "[w]hether state antitrust law issues not previously decided should be certified to the highest court of the state for decision when that procedure is available, or at least separately addressed on appeal." This Court has previously made clear that resort to such a certification procedure is not "obligatory" even when "there is doubt as to local law," but rather "rests in the sound discretion of the federal court." *Lehman Brothers v. Schein,* 416 U.S. 386, 390-91 (1974). Here, there is no basis for concluding that the Court of Appeals abused its discretion in declining certification.

As an initial matter, Petitioner did not properly raise the certification issue below, since it never filed a motion in the Court of Appeals to request certification of a state law question, as required by Second Circuit Rule § 0.27.[7] Rather, Petitioner requested certification below merely by means of two sentences in its brief on the merits. Petitioner's noncompliance with the Second Circuit's Rule for requesting certification precludes it from seeking certification from this Court.

---

7. The full text of Second Circuit Rule 0.27 is as follows:

"§ 0.27 *Certification of Question of State Law*

"Where authorized by state law, this Court may certify to the highest court of a state an unsettled and significant question of state law that will control the outcome of a case pending before this Court. Such certification may be made by this Court *sua sponte* or on motion of a party filed with the clerk of this Court. Certification will be in accordance with the procedures provided by the state's legislature or highest state court rules, e.g., Conn. Public Act. No. 85-111; New York Court of Appeals Rule 500.7. Certification may stay the proceedings in this Court pending the state court's decision whether to accept the certification and its decision of the certified question."

Thus, under this rule, certification can result in only two ways: *sua sponte* or by motion.

Further, the question posed in the Petition does not identify with any specificity what "state antitrust law issues" Petitioner wants to have certified to the New York Court of Appeals. Even the text of the Petition does not define with clarity the legal issue or issues Petitioner wants certified. For example, page 60 of the Petition phrases the question as "whether differences in state policy, etc., justify a result that differs from a decision under the Sherman Act." The Petition also poses a question of "[w]hether resale price maintenance activities occurring within the State of New York that violate the FTC Consent Order . . . are also to be considered an 'unlawful' interference with trade under the Donnelly Act. . . ."

To the extent Petitioner may be attempting to argue (contrary to Judge Sand's opinion) that a violation of the New York Donnelly Act may be established even without proof of concerted activity, such a contention has already been rejected by the New York Court of Appeals. *See State v. Mobil Oil Corp.*, 38 N.Y.2d 460, 465, 381 N.Y.S.2d 426, 428, 344 N.E.2d 357, 359 (1976), which stated that the term "arrangement" as used in the Donnelly Act "must be interpreted as contemplating a reciprocal relationship of commitment between two or more legal or economic entities similar to but not embraced within the more exacting terms, 'contract', 'combination' or 'conspiracy.'" *See also Creative Trading Company, Inc. v. Larkin-Pluznick-Larkin, Inc.*, 148 A.D.2d 352, 353, 539 N.Y.S.2d 1, 1-2 (1st Dep't 1989), which cited *Mobil Oil, supra*, and stated that "the Donnelly Act mandates that there be a conspiracy or a reciprocal relationship between two or more entities before liability can be found."[8]

---

8. In any event, the New York Court of Appeals will not answer questions certified to it unless it is satisfied that the question is determinative of the case. *See, e.g., Retail Software Services, Inc. v. Lashlee*, 71 N.Y. 2d 91, 525 N.Y. 2d 91, 525 N.E. 2d 737 (1988) (per curiam). In light of the various defenses Pendleton asserted below

Petitioner's reliance on this Court's decision in *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), is entirely misplaced. In *Lehman*, this Court relied heavily on the fact that, in that case, the lower federal courts had predicted unsettled law in Florida, "a distant State." As this Court stated:

> "When Federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction."

416 U.S. at 391. Here, by contrast, both the District Court and the Court of Appeals construed law of the state in which they sat (New York), and thus were not "outsiders." Furthermore, as noted above, the issue of whether the New York Donnelly Act requires concerted activity is by no means "uncertain." Rather, that Act has been definitively construed to require concerted activity. Thus, unlike *Lehman*, there is no justification here for requiring the Second Circuit to reconsider its earlier denial of Petitioner's request for certification.

NOTES *(Continued)*

to Petitioner's attempt to bootstrap its Donnelly Act claim onto the Federal Trade Commission's Consent Order, answers to the nebulously worded questions Petitioner wants certified would not be determinative of the outcome of the case.

CONCLUSION

For the foregoing reasons, this Court should deny The Sample's Petition for a Writ of Certiorari.

Respectfully submitted,

Nicholas N. Price*
Barry Simon
Suite 3600, 1600 Market Street
Philadelphia, PA 19103
(215) 751-2196
Attorneys for Respondent

Wayne Hilliard
SPEARS, LUBERSKY, CAMPBELL, BLEDSOE, ANDERSON & YOUNG
520 S.W. Yamhill Street
Portland, Oregon 97204-0388
(503) 226-6151

SCHNADER, HARRISON, SEGAL & LEWIS
Suite 3600, 1600 Market Street
Philadelphia, PA 19103
(215) 751-2000

Of Counsel.

* *Counsel of record for respondent*